

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	
TiVo, Inc.	)	MB Docket No. 11-105
	)	
Request for Waiver of Sections 15.118(b),	)	
15.123(b)(1), and 15.123(c) of the Commission's	)	
Rules	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 7, 2011****Released: September 7, 2011**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. In this Order, we grant, to the extent set forth herein, TiVo, Inc.'s ("TiVo" or "Petitioner") unopposed<sup>1</sup> request for waiver of the Federal Communications Commission's ("Commission") requirements that electronics equipment marketed as "digital cable ready" include tuners that are capable of tuning over-the-air broadcast channels and analog cable channels for its new TiVo Premiere Elite digital video recorder ("DVR"). This device permits simultaneous viewing and recording of up to four digital cable channels and has a capacity of up to 300 hours of high definition programming.<sup>2</sup> We conclude that the waiver is in the public interest because it will reduce the Premiere Elite's cost and power consumption and provide consumers a new retail set-top box option that will compete with devices leased by cable operators. In addition, we condition this waiver on TiVo's commitment to inform consumers and retailers about the capabilities and limitations of this digital device.

**II. BACKGROUND**

2. Congress has twice directed the Commission to adopt regulations to the development of a retail market for cable-ready devices. As part of the Cable Television Consumer Protection and

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<sup>1</sup> Nine commenters (Samuel Biller, Glenn Connery, The Consumer Electronics Association ("CEA"), MegaZone, NagraVision, The National Cable and Telecommunications Association ("NCTA"), Michael D. Scott, David Slade, and Transparent Video Systems), filed comments in support of TiVo's request.

<sup>2</sup> See 47 C.F.R. § 15.118(b) ("Cable ready consumer electronics equipment shall be capable of receiving all NTSC or similar video channels"); 47 C.F.R. § 15.123(b)(1) (prohibiting the sale or marketing of electronics devices as "digital cable ready" or otherwise depicting the device as compatible with digital cable service if it does not tune NTSC analog channels transmitted in-the-clear); 47 C.F.R. § 15.123(c) (requiring electronics devices marketed or sold as "digital cable ready" or otherwise depicted as compatible with digital cable service to comply with standards that require an analog tuner).

Competition Act of 1992, Congress added Section 624A to the Communications Act of 1934, as amended (“Communications Act”),<sup>3</sup> and as part of the Telecommunications Act of 1996, Congress added Section 629 to the Communications Act.<sup>4</sup> Section 624A directs the Commission to adopt regulations to assure compatibility between consumer electronics devices and cable systems to make consumers more likely to purchase, and electronics equipment manufacturers more likely to offer for sale, innovative cable-ready devices.<sup>5</sup> Section 629 requires the Commission to consult with industry standard-setting organizations and adopt regulations to assure the commercial availability of set-top boxes and other equipment used to access multichannel video programming services.<sup>6</sup>

3. In May 1994, pursuant to the directive of Section 624A, the Commission adopted rules to assure compatibility between consumer electronics devices and cable service.<sup>7</sup> As part of those rules, the Commission adopted a requirement that “cable ready” receivers be able to tune analog cable channels up to channel 125.<sup>8</sup> The Commission explained that this requirement was practical and inexpensive, as cable channel 125 corresponded with the highest UHF broadcast channel that TVs are required to tune.<sup>9</sup> This rule, codified at Section 15.118(b) of our rules, ensures that devices marketed as “cable ready” are able to tune the overwhelming majority of cable channels transmitted in analog.

4. In October 2003, the Commission adopted rules to implement Section 629, which directs the Commission to adopt regulations to assure the commercial availability of set-top boxes and other equipment used to access multichannel video programming services. Among other things, the rules require devices marketed as “digital cable ready” to meet certain standards to ensure that they are compatible with cable systems nationwide.<sup>10</sup> TiVo seeks waiver of two specific requirements adopted in the *Digital Plug and Play Order*. First, the Commission’s rules require manufacturers to test “digital cable ready” devices for compliance with a standard that specifies that the device shall include an analog

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<sup>3</sup> 47 U.S.C. § 544a.

<sup>4</sup> 47 U.S.C. § 549(a).

<sup>5</sup> 47 U.S.C. § 544a.

<sup>6</sup> 47 U.S.C. § 549(a).

<sup>7</sup> *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatibility between Cable Systems and Consumer Electronics Equipment*, 9 FCC Rcd 1981 (1994) (“*Analog Plug and Play Order*”). The term “plug and play” refers to a device’s ability to plug into a cable system and receive cable programming without a cable-operator provided set-top box.

<sup>8</sup> *Id.* at 1995-7, ¶¶ 78-90. (“[W]e will require ‘cable ready’ TV receivers and VCRs to tune to cable channels specified by the EIA IS-132 standard up to a minimum frequency range of 806 MHz.”). 806MHz corresponds to channel 125 on cable systems under the EIA IS-132 standard. *See* Electronic Industry Association’s “Standard Cable Television Channel Identification Plan, IS-132, May 1994” (EIA IS-132).

<sup>9</sup> *Analog Plug and Play Order*, 9 FCC Rcd at 1996, ¶ 89 (“Inasmuch as TV receivers normally incorporate a single tuner for both cable and broadcast channels and the appropriate upper range for cable is essentially the same as the existing broadcast tuning requirement, we believe it would be appropriate to adopt the minimum tuning range for broadcast channels as the upper cable channel tuning requirement for ‘cable ready’ equipment.”). This requirement is not related to the “All Channel Receiver Act,” 47 U.S.C. § 303(s), and this Order does not address issues associated with Section 303(s) of the Communications Act.

<sup>10</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 20885 (2003) (“*Digital Plug and Play Order*”). *See* 47 C.F.R. §§ 15.123(b)(1), 15.123(c).

RF tuner to access analog cable channels.<sup>11</sup> Second, the Commission's rules require digital cable ready devices to include over-the-air tuners.<sup>12</sup> The Commission based this rule on consumer expectations: "In the analog environment, the public has come to understand that television receivers labeled or marketed as 'cable ready' universally include the capability of receiving over-the-air broadcast service. We believe it would be inconsistent with consumer expectations and thus affirmatively misleading for digital cable ready receivers not to include digital over-the-air reception capability."<sup>13</sup>

5. On June 7, 2011, TiVo filed a request for waiver of the Commission's tuner requirements with respect to its TiVo Premiere Elite DVR, pursuant to Section 629(c) of the Communications Act and Sections 1.3, 76.7, and 76.1207 of the Commission's rules.<sup>14</sup> TiVo explained that it "recently developed the Premiere Elite, which is an all-digital, CableCard-enabled DVR designed specifically for use in all-digital cable systems."<sup>15</sup> Further, TiVo explained that it "is already taking orders for a version of the Premier Elite from cable operators."<sup>16</sup> TiVo states that it can sell the product to cable operators for lease to subscribers; however, because the Premiere Elite does not have the capability to receive and tune any analog cable channels or over-the-air signals, Sections 15.118(b), 15.123(b)(1), and 15.123(c) prevent TiVo from testing and marketing the Premiere Elite as a digital cable ready product for sale at retail.<sup>17</sup> TiVo asserts that waiver will serve the public interest in three ways: First, TiVo argues that waiver will advance Section 629's goal of a competitive retail market for navigation devices.<sup>18</sup> Second, TiVo asserts that waiver will promote consumer adoption of digital cable service.<sup>19</sup> Finally, TiVo states that waiver will benefit consumers by lowering the Premiere Elite's price, reducing its power consumption, reducing its size, and increasing its storage capacity.<sup>20</sup> To counteract the consumer confusion that our rules are intended to prevent, TiVo has voluntarily committed to labeling, marketing and retailer education programs.<sup>21</sup> The education program will inform customers and retailers that the Premiere Elite can only tune digital cable signals and explains that this limitation means that consumers cannot use the Premiere Elite to receive any over-the-air television or analog cable television.

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<sup>11</sup> See 47 C.F.R. § 15.123(c) (referencing Uni-Dir-PICS-I01-030903: "Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma," September 3, 2003 and M-UDCP-PICS-I04-080225, "Uni-Directional Cable Product Supporting M-Card: Multiple Profiles; Conformance Checklist: PICS," February 25, 2008).

<sup>12</sup> 47 C.F.R. § 15.123(b)(1).

<sup>13</sup> *Digital Plug and Play Order*, 18 FCC Rcd at 20901, ¶ 34.

<sup>14</sup> TiVo Inc.'s Petition for Waiver of Section 15.118(b), 15.123(b)(1), and 15.123(c) of the Commission's Rules, MB Docket No. 11-105 (filed June 7, 2011) ("Waiver Request").

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 2-3. Devices that cable operators deploy directly to their subscribers are not subject to the requirements of Section 15.118(b), 15.123(b)(1), and 15.123(c), as cable operators are familiar with the specific technical requirements for compatibility within each of their systems and subscribers do not expect those devices to receive over-the-air broadcast service.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 5-7.

<sup>20</sup> *Id.* at 7-8.

<sup>21</sup> *Id.* at 8-10; Letter from Gary S. Lutzker, Counsel, TiVo, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 11-105 (filed August 10, 2011); Letter from Gary S. Lutzker, Counsel, TiVo, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 11-105 (filed August 15, 2011).

6. Nine commenters filed in support of TiVo's request. Several consumers encourage the Commission to grant TiVo's request, asserting that waiver would lower equipment costs and increase retail set-top box competition.<sup>22</sup> NagraVision and Transparent Video Systems also favor the grant of TiVo's request and argue that the Commission should extend the waiver to all similar products, asserting that doing so would promote set-top box competition.<sup>23</sup> They further contend that in all-digital cable systems, analog tuners are entirely superfluous and merely add cost, size, complexity, and power consumption without providing any functionality to consumers.<sup>24</sup> NCTA and CEA both support TiVo's request as well. NCTA's support stems from its assertion that the Commission's "plug and play" compatibility rules hinder innovation, and that "coordination between service providers and device manufacturers" is a preferable way to ensure device compatibility.<sup>25</sup> CEA, on the other hand, generally supports rules that promote national standards to achieve device compatibility, but believes that waiver in this instance will further the market for devices that can access cable services.<sup>26</sup> Both NCTA and CEA emphasize the importance of the Commission's cable ready labeling regime: "The Commission's rules concerning [digital cable ready] specifications and labeling serve the important function of informing consumers and protecting their investments in video devices."<sup>27</sup> Accordingly, NCTA encourages the Commission to condition the waiver upon TiVo educating consumers about the limits of the Premiere Elite's capabilities.<sup>28</sup> In reply comments and an *ex parte* letter, TiVo affirmed its voluntary commitment to its consumer education campaign, and modified its education materials slightly in response to NCTA's comments.<sup>29</sup>

### III. DISCUSSION

7. We find good cause to grant TiVo's waiver request subject to the conditions described below.<sup>30</sup> As discussed above, the Commission adopted Sections 15.118(b), 15.123(b)(1) and 15.123(c) to achieve two purposes: (1) to establish standards for compatibility between retail electronics equipment and cable services, and (2) to prevent consumer confusion. In this regard, we note that TiVo has worked with the cable industry to ensure that the Premiere Elite will work on all-digital cable systems, which lessens the adverse impact on compatibility.<sup>31</sup> Furthermore, by voluntarily committing to launch a

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<sup>22</sup> Michael D. Scott Comments at 1; Samuel Biller Comments at 1-2; Glenn Connery Comments at 1; MegaZone Comments at 1; David Slade Comments at 1.

<sup>23</sup> NagraVision Comments at 2; Transparent Video Systems Comments at 6.

<sup>24</sup> NagraVision Comments at 3; Transparent Video Systems Comments at 2-4.

<sup>25</sup> NCTA Comments at 2.

<sup>26</sup> CEA Comments at 1.

<sup>27</sup> CEA Comments at 2; *see also* NCTA Comments at 3 ("TiVo's request warrants some precautions because the device it seeks to introduce would not have full 'plug and play' functionality nor be portable across all cable systems.").

<sup>28</sup> NCTA Comments at 2-3.

<sup>29</sup> TiVo Reply at 3-4; Letter from Gary S. Lutzker, Counsel, TiVo, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 11-105 (filed August 15, 2011).

<sup>30</sup> Section 1.3 of the Commission's rules states that "[t]he provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3.

<sup>31</sup> Waiver Request at 2-3 ("TiVo already is taking orders for a version of the Premiere Elite from cable operators for deployment later this year to customers served by digital cable systems."); NCTA Comments at 2 ("The TiVo

campaign to educate consumers about the capabilities and limitations of the Premiere Elite,<sup>32</sup> TiVo has offered measures to reduce the possibility of consumer confusion. As we explain more fully below, the benefits that will result from waiver, when viewed in light of TiVo's education and marketing commitments, establish that deviation from the general rules will serve the public interest better than strict adherence to them.<sup>33</sup>

8. We conclude that TiVo has demonstrated good cause for a waiver.<sup>34</sup> We find that waiver of the Commission's rules in this instance should reduce the cost of the Premiere Elite by \$80 to \$100, reduce its power consumption, and introduce a new, retail CableCARD device option to consumers.<sup>35</sup> Thus, our grant of this waiver should result in tangible consumer benefits. Commenters unanimously agree with TiVo that the Premier Elite is an "innovative product,"<sup>36</sup> and TiVo touts the device's recording capacity of 300 hours of high definition programming and ability to permit viewing and recording of up to four channels simultaneously.<sup>37</sup> In light of the fact that the TiVo Premiere Elite device is specifically intended for operation with all-digital cable systems that do not provide any analog video programming services and is intended for distribution by both cable systems and retailers, this waiver extends only to that specific set-top box, and not to all service providers and set-top cable terminal device products and for all providers of services and products. Any device manufacturer that seeks to offer at retail a device similar to the Premiere Elite must petition for, and receive, a waiver from the Commission based on the specific facts and circumstances surrounding its proposed retail offering.

9. In granting this waiver, however, we recognize NCTA's point that although the cable industry has significantly increased the penetration of its digital services since the Commission adopted the *Digital Plug and Play Order* in 2003, many cable systems "continue to carry substantial numbers of channels only in analog," and "even on systems that simulcast all channels in digital, some customers may subscribe only to analog service."<sup>38</sup> Accordingly, we conclude that as a condition of this waiver TiVo must engage in the consumer education program which it voluntarily proposed. This condition will

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petition was crafted after consultation with the cable industry on how best to bring an innovative product to market when Commission rules, written for a different time, forbid it.").

<sup>32</sup> Specifically, TiVo will inform consumers about the Premiere Elite's inability to receive and tune analog and digital over-the-air signals and analog cable signals.

<sup>33</sup> *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("[W]aiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.").

<sup>34</sup> While we find good cause to grant TiVo's waiver pursuant to Section 1.3 of the Commission's rules, we do not grant TiVo's request for waiver pursuant to Section 629(c) of the Communications Act or Section 76.1207 of the Commission's rules. Section 15.118(b) owes its origins to Section 624A of the Communications Act and was not adopted pursuant to Section 629 of the Communications Act; therefore waiver of Section 15.118(b) pursuant to Section 629(c) is inappropriate. Furthermore, waiver is not necessary to assist in the introduction or development of the Premiere Elite. 47 U.S.C. § 549(c); Waiver Request at 3 ("TiVo already is taking orders for a version of the Premiere Elite from cable operators for deployment later this year."); *Comcast Corporation's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules; Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 22 FCC Rcd 17113, 17118, ¶ 9 (2007), *petition for review denied*, *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008).

<sup>35</sup> Waiver Request at 3-4

<sup>36</sup> NCTA Comments at 2; CEA Comments at 1.

<sup>37</sup> Waiver Request at 3.

<sup>38</sup> NCTA Comments at 2-3.



ensure that the benefits of waiver of the tuner rules, namely, increased retail device competition and reduced cost and power consumption, outweigh the counteracting burden on consumer expectations.

10. The rules the Commission adopted in the *Analog Plug and Play Order* in 1994 reflect the consumer expectation that cable-ready devices will be able to tune those analog channels. Furthermore, as the Commission stated in the *Digital Plug and Play Order*, “the public has come to understand that television receivers labeled or marketed as ‘cable ready’ universally include the capability of receiving over-the-air broadcast service.”<sup>39</sup> To temper these expectations, a comprehensive consumer education program is necessary to ensure that consumers are not misled and that only consumers who subscribe to all-digital cable service, or who have adequate knowledge and notice of the device’s inherent limitations, purchase the Premiere Elite. TiVo has voluntarily agreed to such an education program. We believe that the in-store documents, product packaging notices, and retailer training materials that TiVo presented to Commission staff,<sup>40</sup> as modified by TiVo’s August 15, 2011 *ex parte* letter,<sup>41</sup> will adequately ensure that consumers and retail sales staff have sufficient understanding of the capabilities and limitations of the Premiere Elite.<sup>42</sup> Accordingly, this waiver of Sections 15.118(b), 15.123(b)(1) and 15.123(c) of our rules is expressly conditioned on TiVo’s continuing to market the Premiere Elite and educate consumers in a manner consistent with its filings for as long as it makes the Premiere Elite available at retail.<sup>43</sup>

11. We also find good cause to grant TiVo a partial waiver, *sua sponte*, of Section 15.123(d) of our rules. Section 15.123(d) requires post-sale material for “digital cable ready” devices to include language that states that the device is capable of “receiving analog basic . . . programming by direct connection to a cable system providing such programming.”<sup>44</sup> In lieu of that notice, and as a condition of waiver, TiVo shall replace the analog portion of the post-sale notice with the post-sale material that TiVo has voluntarily agreed to include, which is contained in the Appendix to this Order. Section 15.123(d) of our rules also requires notification that advanced and interactive digital cable services, such as video-on-demand, may not be available on retail devices. We do not waive the requirement that TiVo include that information in post-sale material, and therefore TiVo must include the following notice: “Certain advanced and interactive digital cable services such as video-on-demand, a cable operator’s enhanced

<sup>39</sup> *Digital Plug and Play Order*, 18 FCC Rcd at 20901, ¶ 34.

<sup>40</sup> Letter from Gary S. Lutzker, Counsel, TiVo, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 11-105 (filed August 10, 2011).

<sup>41</sup> Letter from Gary S. Lutzker, Counsel, TiVo, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 11-105 (filed August 15, 2011).

<sup>42</sup> In reaching our conclusions today, we rely on the fact that TiVo still intends to manufacture and sell set-top boxes that are compatible with analog cable service and over-the-air television. Waiver Request at 9 (“For customers that continue to receive analog cable service, TiVo’s other models will remain available, and TiVo’s sales representatives will be trained to recommend TiVo’s dual analog/digital devices to those consumers.”). We will continue to monitor marketplace developments, and we reserve the right to revisit this issue and determine that waiver is no longer in the public interest if we discover that analog cable service customers and over-the-air viewers no longer have retail options.

<sup>43</sup> Waiver Request at 9; Letter from Gary S. Lutzker, Counsel, TiVo, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 11-105 (filed August 10, 2011) *as modified by* Letter from Gary S. Lutzker, Counsel, TiVo, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 11-105 (filed August 15, 2011). Per NCTA’s request, we clarify that neither this waiver nor the availability of digital-only devices at retail creates “any requirement or expectation for cable operators who carry analog services to change their networks, services, or prices to meet the digital-only receiver constraints of this device.” NCTA Comments at 3.

<sup>44</sup> 47 C.F.R. § 15.123(d).

program guide and data-enhanced television services may require the use of a set-top box. For more information call your local cable operator.”<sup>45</sup> This will assure that consumers are not confused about the capabilities of the Premiere Elite. TiVo’s adherence to this post-sale messaging is also a condition of this waiver.

#### IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, the request for waiver filed by TiVo, Inc., **IS GRANTED** with respect to the TiVo Premiere Elite set-top box as set forth and conditioned above.

13. **IT IS FURTHER ORDERED** that, pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, waiver of Section 15.123(d), 47 C.F.R. § 15.123(d) of the Commission’s rules **IS GRANTED IN PART** to TiVo, Inc. with respect to the TiVo Premiere Elite set-top box, as set forth and conditioned above.

14. **IT IS FURTHER ORDERED** that, pursuant to Section 629(c) of the Communications Act, 47 U.S.C. § 549(c), and Section 76.1207 of the Commission’s rules, 47 C.F.R. § 76.1207 the request for waiver filed by TiVo, Inc., **IS DENIED**.

15. This action is taken pursuant to authority delegated by Section 0.283 of the Commission’s rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau

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<sup>45</sup> *Id.*

**APPENDIX**TiVo's Consumer Education Labeling and Marketing Documentation

- (1) In-Store Product Information: The Premiere Elite "Data Sheet" shall prominently notify potential customers that it is "Compatible with digital cable and Verizon FiOs®" and that customers will need a "Digital Cable TV or Verizon FiOs® connection (does not support satellite, AT&T U-verse or antenna)." The Data Sheet shall also include the following detailed notice:

CableCARD™ Decoder. A CableCARD decoder is required for your TiVo Premiere Elite DVR to receive cable programming. The TiVo Premiere Elite is designed for use only with digital cable systems. It does not receive analog programming, including over-the-air, and will not work with an over-the-air antenna. Most of the largest cable providers have "digital simulcast," which means they rebroadcast all their analog channel programming on digital channels as well. This means that all or most of the programs available on analog channels are also available on digital channels when a CableCARD is inserted. Therefore, if your provider has "digital simulcast" and rebroadcasts all of its programming in digital you will not miss any of your cable channel programming with a TiVo Premiere Elite. If you are unsure whether your cable operator's service provides all-digital or digital simulcast of all analog programming, please contact your provider. If you plan to relocate to a new area or change your video service provider, please contact your new provider to determine whether it offers all-digital or digital simulcast service for all its analog programming.

- (2) The information booklet included with all Premiere Elite units shall include a notification essentially identical to the notice provided on the in-store "Data Sheet."
- (3) Quick Start Guide — The Premiere Elite packaging shall include an installation guide that includes the following prominent notice:

The TiVo Premiere Elite is intended for use with digital cable systems only and does not work with external cable boxes, analog cable, or over-the-air antennas. A CableCARD decoder is required to receive any cable programming. To receive digital cable channels, and to watch and record multiple channels at the same time, you need one Multi-Stream CableCARD decoder (M-Card) from your cable company.